

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

75-1136

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1795

United States Court of Appeals

For the Second Circuit.

THE UNITED STATES OF AMERICA,

Appellee,

-against-

THOMAS B. MURPHY and ROBERT WIDMAN

Defendants-Appellants

On Appeal from Order of the United States Court for the Eastern District of New York

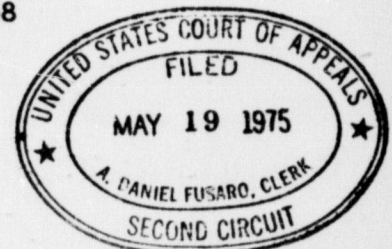
Appendix

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TABLE OF CONTENTS

Docket Entries	1
Indictment	4
Charge to the Jury	7
Judgment and Commitment	63
Excerpts from Trial Transcript	65

1025

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine,		4/4/75	Notice of Appeal (no fee)		
Clerk,			(BOTH DEFTS)		
Marshal,					
Attorney,					
Commissioner's Court,					
Witnesses,					

UNITED STATES COURT OF APPEALS
FILED
APR 18 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

DATE	PROCEEDINGS
12/26/74	Before MISHLER, CH.J.- Indictment filed
1-8-75	Notice of Appearance filed as to deft Murphy.
1-8-75	Before MISHLER, CH J - case called - deft Murphy & counsel Harold Borg present - deft Widman present without counsel - court to appoint counsel for deft Widman. Deft Murphy arraigned and enters a plea of not guilty - court enters a plea of not guilty as to deft Widman - bail set at \$25,000 as to deft Murphy and \$100,000 as to deft Widman - Identification hearing set down for Jan. 24, 1975 at 1:00 PM. Trial set down for Jan. 27, 1975 at 10:00 A.M.
1/13/75	Notice of readiness for trial filed
1-27-75	Before MISHLER, CH J - case called - defts Murphy & Widman present with counsels - hearing held on motion to suppress - hearing contd to Jan. 27, 1975 at 9:30 am.

2

74CR 817

DATE	PROCEEDINGS
1-27-75	Before MISHLER, CH J - case called - defts Murphy & Widman & counsels present - hearing contd - trial order and BEGUN - Jurors selected and sworn - Hearing held on voluntariness of statements - motion to suppress denied - hearing concluded - Trial contd to Jan. 28, 1975.
1-28-75	Before MISHLER, CH J - case called - defts present with attys - Trial resumed - Trial contd to Jan. 29, 1975 at 10:00 am.
1-29-75	Before MISHLER, CH J - case called - defts Murphy & Widman present with counsels - trial resumed - trial contd to 1-30-75., at 11:15 am.
1-30-75	Before MISHLER, CH J - case called - defts present with attys - trial resumed - Govt rests - motion by the defts for a judgment of acquittal is denied - Deft WIDMAN rests - trial contd to 1-31-75.
1-31-75	Before MISHLER, CH J - case called - defts present with counsels - Trial resumed - deft Murphy rests - Motion renewd by the defts for Judgment of Acquittal is denied - At 4:25 PM Jury returned with a verdict of guilty on counts 2 & 3 as to both defts .Jury did not have time to arrive at a verdict on count 1 - Jury polled & discharged Trial concluded - Bail conditions modified as to deft Widman to \$50,000 surety bond signed by mother and father and a cash deposit of \$5,000. Bail conditions contd as to deft Murphy - all motions reserved until time of sentence - sentences adjd without date.
1-31-75	By MISHLER, CH J - Order of sustenance filed (Lunch)
2-18-75	7 stenographers transcript filed dated ^{one} Jan. 24, 1975; two dated Jan. 2 one dated Jan. 28, one dated Jan. 29, one dated Jan. 30 and one dated Jan. 31, 1975.
2-25-75	Voucher for Expert Services filed (Widman)
4/4/75	Before MISHLER, CH.J.- Case called- Defts and counsel present- Defts WIDMAN and MURPHY sentenced to imprisonment on count 2 for a period of 15 years pursuant to T-18, U.S.C. Sec. 4208(a)(2) and 5 years on count pursuant to T-18, U.S.C. Sec. 4208(a)(2)- said terms to run concurrentl Court advised defts of their ght to appeal- Clerk to file notice of app without fee as to both defts- Bail as to deft Murphy set at \$50,000.00 surety bond
4/4/75	Judgments and Commitments filed- certified copies to Marshal (BOTH DEFTS)
4/4/75	Notice of appeal filed (without fee) (BOTH DEFTS)
4/4/75	Docket entries and duplicate of notice of appeal mailed to court of app
4/7/75	Certified copies of judgments and commitments ret'd and filed- defts del to Federal Detention Headquarters
4-14-75	Stenographers transcript filed dated 4-4-75 (Murphy)

12

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A TRUE COPY
ATTEST
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LEWIS ORGEL
CLERK
BY *[Signature]*
DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SUPERSEDING
INDICTMENT

Murphy, S.

----- X
UNITED STATES OF AMERICA

Cr. No. 74CR 811
(T. 18, U.S.C., §2113(a),
§2113(d), §2 and §371)
December 30, 1974

- against -

THOMAS B. MURPHY and
ROBERT WIDMAN,

Defendants.

----- X
THE GRAND JURY CHARGES:

COUNT ONE

On or about the 9th day of May, 1974, within the Eastern District of New York, the defendants THOMAS B. MURPHY and ROBERT WIDMAN knowingly and wilfully, by force, violence, and intimidation, did take from the person and presence of employees of the Chase Manhattan Bank, 190-02 Jamaica Avenue, Jamaica, New York, approximately Seventy Three Thousand Five Hundred Ninety Four Dollars (\$73,594.00), in United States currency, which money was in the care, custody, control, management and possession of the said bank, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18, United States Code, Sections 2113(a) and 2.)

COUNT TWO

On or about the 9th day of May, 1974, within the Eastern District of New York, the defendants THOMAS B. MURPHY and ROBERT WIDMAN knowingly and wilfully, by force, violence and intimidation, did take from the person and presence of employees of the Chase Manhattan Bank, 190-02 Jamaica Avenue, Jamaica, New York, approximately Seventy Three Thousand Five Hundred Ninety Four Dollars (\$73,594.00), in United States currency, which money was in the care, custody, control, management and possession of the said bank, the deposits of

which bank were then and there insured by the Federal Deposit Insurance Corporation, and in commission of this act and offense the defendants THOMAS B. MURPHY and ROBERT WIDMAN did assault and place in jeopardy the lives of the said bank employees, as well as the lives of other persons present by the use of a dangerous weapon. (Title 18, United States Code, Sections 2113(d) and 2.)

COUNT THREE

On or about and between the 6th day of May 1974 and the 9th day of May 1974, both dates being approximate and inclusive, within the Eastern District of New York, the defendants THOMAS B. MURPHY and ROBERT WIDMAN did knowingly and wilfully conspire to commit an offense against the United States, in violation of Title 18, United States Code, Section 2113(a) and Section 2113(d) by conspiring to take by force and violence a sum of money which was in the care, custody, control, management and possession of the Chase Manhattan Bank, 190-02 Jamaica Avenue, Jamaica, New York, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation.

In furtherance of the said unlawful conspiracy and for the purpose of effecting the objectives thereof, the defendants THOMAS B. MURPHY and ROBERT WIDMAN, within the Eastern District of New York, committed the following

OVERT ACTS

(1) On or about May 6th, 7th and 8th, 1974, the defendants THOMAS B. MURPHY and ROBERT WIDMAN positioned themselves within the vicinity of said bank at a place where the daily functions of the bank could be observed.

(2) On or about the 9th day of May 1974, the defendants THOMAS B. MURPHY and ROBERT WIDMAN entered the Chase Manhattan Bank at 190-02 Jamaica Avenue, Jamaica, New York, and had in their possession dangerous weapons.

A TRUE BILL.

FOREMAN.

UNITED STATES ATTORNEY

1 and I will then charge you on the law.

2 (A 5-minute recess was taken and at 11:35
3 a.m. the trial resumed.)

4 THE COURT: All right, seat the jury.

5 (The jury took it's place in the jury box.)

6 Charge by the Honorable Jacob Mishler,
7 Chief United States District Judge, to the jury.

8 THE COURT: Madam Foreman, ladies and gentle-
9 men of the jury:

10 You heard all the evidence in the case, the
11 lawyers have argued the evidence to you and I have
12 the obligation of charging you on the relevant law.

13 A trial is an adversary proceeding in this
14 country. The lawyers have the obligation of pro-
15 ducing the evidence, developing the evidence during
16 the trial for the jury to see. The lawyers are
17 advocates, they are protagonists, they are partial.
18 They can best do their job when they perform with the
19 zeal that requires an understanding of each client's
20 position. The theory is that when lawyers have com-
21 parable abilities and contest an issue of fact --
22 that is where one takes one side and the other takes
23 the other side -- that the evidence will be developed
24 before the jury to see.

25 The jury and the Court, on the other hand, are

1 impartial and objective. We both must look at
2 this as judges, calmly, without any sympathy,
3 without any bias, without any prejudice.

4 The jury is the sole judge of the facts, the
5 jury is as complete a judge in this case as the
6 Court is the judge of the law. The effectiveness of
7 a jury trial depends on the willingness of the jury
8 to look at the facts and seek the truth, and then
9 having found from the contested issues what happened,
10 which is what we mean when we say that the jury is
11 the judge of the facts, you then apply the law as I
12 charge you.

13 I have no opinion as to the guilt or innocence
14 of either of the defendants, as to either of these
15 charges. I leave that solely to you and that is as
16 it should be. On the other hand, you must as jurors
17 accept the law as I charge it, even though you dis-
18 agree with the charge as I give it or any part of it.
19 You have the obligation of accepting it as the law
20 of the case and applying it to the facts as you find
21 them.

22 The case is entitled United States of America
23 against Thomas Murphy and Robert Widman. As I will
24 charge you later, there are 3 counts in the indictment,
25 and as I indicated to you before, the first 2 counts

1 represent a lesser and graver charge of the same
2 violation while the third count is the conspiracy
3 count. But each defendant must be judged separately,
4 individually on each count. It is as if you had 4 or
5 6 trials, depending on how you look at it, that is
6 if you think of the first 2 counts as 1 count.

7 The defendants have pleaded not guilty to all
8 the counts in the indictment.

9 In giving you my charge, I may say "defendant,"
10 I may say "defendants," I may use "the accused," in
11 the singular or in the plural and apply it to both,
12 but it all means the same. I may say "defendant,"
13 meaning both defendants or I may use "the accused," or
14 use "defendants." If I intend that the charge
15 applies solely to one defendant, I will indicate it.

16 The defendants are presumed to be innocent. The
17 presumption of innocence is a strong presumption and
18 time-honored in Anglo-American jurisprudence. It
19 means that the defendants start off with a clean slate,
20 you must conclude that they are innocent of the charges
21 in the indictment and the conclusion remains through-
22 out the trial and throughout your deliberations, it
23 remains, it prevails unless overcome by proof of the
24 guilt of the accused beyond a reasonable doubt. In
25 other words, to put the obligation of the jury and the

1 obligation of the Government in it's proper pers-
2 pective, you think of this as not a determination of
3 whether the defendant is innocent or the defendants
4 are innocent, but rather whether the Government has
5 proved guilt beyond a reasonable doubt.

6 (Continued next page.)
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Charge of the Court

572

THE COURT: (Addressing the jury.)

What is proof, what is a reasonable doubt/
A reasonable doubt is a doubt which a reasonable
person has after carefully weighing all of the
evidence in the case.

Now, we understand that it is normal for
individuals to be disinclined to return a verdict of
of guilty, even where guilt is proven, so the kind of
a doubt that might arise from the disinclination to
find a defendant guilty who has been proven guilty
is not the kind of doubt we are talking about. We
are not talking about a vague or speculative doubt
or one based on emotion.

The kind of doubt we are talking about is one
that is present in the record, in the evidence in the
case.

Proof beyond a reasonable doubt -- I am sorry,
I would rather continue defining a reasonable doubt.
A reasonable doubt is the kind of doubt you might
have after dealing with all the evidence and would
hesitate to act upon if it concerned a matter of
importance to you.

Proof beyond a reasonable doubt is therefore
proof of such a convincing nature that you would be

1 willing to rely and act upon unhesitatingly in the
2 most important of your own affairs.
3

4 The Government's burden is not to prove that
5 all the evidence or every bit of evidence that was
6 offered before you is true beyond a reasonable doubt,
7 the Government's burden, as heavy as it is, is not
8 to prove the guilt of the defendant beyond all doubt,
9 the Government's burden is to prove the guilt of the
10 defendant beyond a reasonable doubt.

11 When we talk about proof beyond a reasonable
12 doubt, I will charge you on the elements of each
13 crime charged and that the Government must prove all
14 the essential elements of the crime charged beyond
15 a reasonable doubt.

16 A reasonable doubt may arise from the failure
17 of the Government to produce evidence. The defendants
18 do not have to prove their innocence, the defendants
19 do not have to offer any proof whatsoever; on the
20 contrary, they are presumed to be innocent and they
21 may rely on the failure of the Government to prove
22 their guilt beyond a reasonable doubt.

23 Now in this case the defendant Widman has
24 offered as evidence, good general reputation for
25 honesty and as a law abiding citizen. The jury

1
2 should consider that evidence along with all the other
3 evidence in the case.

4 Evidence that a defendant's reputation for
5 honesty or as a law abiding citizen have not been
6 discussed or that those traits of the defendant's
7 character have not been questioned may be
8 sufficient to warrant an inference of good reputation
9 as to those traits or character, and evidence of a
10 defendant's reputation consistent with those traits
11 of character which are ordinarily involved in the
12 commission of a crime charged may give rise to a
13 reasonable doubt since the jury may think it
14 improbable that a person possessing those traits of
15 character would commit the crime charged.

16 Now what is evidence:

17 Evidence is the method the law uses to prove
18 or disprove a disputed fact. Evidence is generally
19 classified as direct evidence or indirect evidence,
20 and indirect evidence is usually called circumstantial
21 evidence.

22 Direct evidence is the testimony of witnesses,
23 of what a witness saw or the witness said. Circum-
24 stantial evidence, on the other hand, is the method that
25 the jury uses for determining a disputed fact

1
2 from an established fact.

3 Drawing a fair and reasonable inference based on
4 good common sense and experience:

5 In your search for the truth, you will find the
6 most valuable tools to be your own good common sense
7 experience. We have all lived sometime on this
8 earth and we have learned something from just living
9 here through our common experience. Do not be reluc-
10 tant to use your good common sense and experience and
11 say to yourselves, "Well, does this make sense?" It
12 is a good question which you might ask repeatedly
13 throughout your deliberations.

14 I would like to use an example of the difference
15 between direct and circumstantial evidence, it will
16 be helpful in explaining the definition I just gave
17 you.

18 Let us assume that my courtroom deputy, Mr.
19 Adler, and myself were standing on the street corner
20 one day and at that street corner there was a stop
21 sign, he with his back to the roadway and the stop-
22 sign and I having the entire sign and roadway in
23 plain view.

24 Let us assume that while speaking with him I
25 noticed a motor vehicle that I later identified as a

Charge of the Court

5

1 1975 white Cadillac speeding along at 65 miles an
2 hour, pass the stop sign without stopping and strike
3 a woman.
4

5 If I were called to testify in a personal
6 injury action where the woman was suing the driver
7 of the car, I would be able to testify to the fact
8 that that motor vehicle passed a stop sign without
9 stopping.

10 If you were sitting here as a jury in this
11 case, plaintiff claiming that the defendant passed
12 a stop sign without stopping and the defendant
13 claiming that he stopped at the stop sign and pro-
14 ceeded, you would recognize that the disputed fact
15 was whether or not the defendant passed a stop sign
16 without stopping.

17 If I were called to testify, it is clear that
18 I could give direct testimony on that fact at issue.

19 Now Mr. Adler did not have the stop sign in
20 view but he nevertheless could testify concerning
21 the circumstances from which you might reasonably
22 draw the inference that that motor vehicle passed
23 the stop sign without stopping.

24 He might say that he was talking with me and
25 as he glanced to his right the 1975 Cadillac came

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2 within his view, within his peripheral vision, and
3 he noticed the car proceeding at about 65 miles an
4 hour, that he lost sight of the car and that it was
5 about 150 feet and two or three seconds later when
6 he looked to the left and saw the same motor vehicle
7 at the same rate of speed and it knocked down the
8 plaintiff.

9 Again the disputed issue of fact is whether that
10 vehicle passed the stop sign without stopping. From
11 the circumstances I think you will agree with me
12 that it would be reasonable for you to infer that
13 that motor vehicle passed the stop sign without
14 stopping, that it was travelling 65 miles an hour
15 and that 150 feet later or two or three seconds later
16 it was travelling about the same speed so it couldn't
17 have stopped and then proceeded. At least that is
18 the fair and reasonable inference.

19 That is the difference between direct evidence
20 and circumstantial evidence.

21 The law does not hold that one type of evidence
22 is of better quality than the other. At times
23 direct evidence is of a better quality and at times
24 circumstantial evidence is ^{of} a better quality.

25 The law requires the Government to prove the

Charge of the Court

577A

guilt of the defendant beyond a reasonable doubt on
both the direct and the circumstantial evidence.

(Contd on next page.)

1 THE COURT: (Continuing) I used the term
2 "inference" and I used the term "presumption."

3 An inference is a conclusion which reason and
4 common sense leads the jury to draw from facts which
5 have been established by the evidence in the case.
6 An example of that, of course, is the inference which
7 a jury draws in determining facts through circumstantial
8 evidence. A presumption, on the other hand, is a
9 conclusion which the law requires the jury to make,
10 and it continues only as long as it is not overcome
11 or outweighed by evidence in the case to the contrary
12 by proof beyond a reasonable doubt. The example of
13 that, of course, is the presumption of innocence.

14 What is evidence in the case? It is the sworn
15 testimony of the witnesses regardless of who may have
16 called them; it is the exhibits that were actually
17 received in evidence regardless of who produced them;
18 facts which may have been judicially noticed by the
19 Court -- I am not sure that I judicially noticed any
20 facts, but if I said, for example, that May 9, 1974,
21 was the Thursday of the week or that May 13, 1974,
22 was the Monday of the week, then I judicially noticed
23 the fact and it becomes a part of the record.

24 I think it is helpful to understand what is
25 not a part of the record and what you may not consider

Charge of the Court

in arriving at your determination:

First, statements or arguments made by counsel in both the openings and the summations. Counsel pointed out to you the purpose; both are very helpful tools or guides for the jury, but they are not evidence. The openings were designed to alert you to the positions of the parties. The summations or arguments made by the lawyers focused on what they believed the crucial issue in the case was: they pointed out the evidence relating to whether the accused were at the bank and in the bank on the morning of May 9, 1974. Of course, the defendants argued theories of exculpability, which in effect say the Government failed to prove the guilt of my client by proof beyond a reasonable doubt. The argument of the Government was, in effect, that the Government has proved the guilt of both defendants by proof beyond a reasonable doubt.

The arguments again are intended to guide you as to what the lawyers think is the important evidence and what are the important issues and to help you arrive at a fair determination.

They are not intended

1
2 to be evidence. And if the lawyers have misquoted
3 or misinterpreted the evidence, then you use your
4 own recollection as to what the evidence was. And
5 of course we have a transcript of the testimony and
6 I will tell you later that if there is a question in
7 your mind as to what anyone said, it will be read
8 back to you.

9 I don't recall making any remarks or statements,
10 but if I did of course that is not evidence. I have
11 no standing in this trial except as the judge of the
12 law, and if I did make any statements, just disregard
13 them. If I asked a question, and I recall asking
14 just one or two, don't attach any special significance
15 to the question because I asked it, If I asked the
16 question it was only because I thought an area of
17 inquiry was a little confusing, confusing to me, it
18 may not have been confusing to you, but I assumed it
19 was, so I asked a question or two in the hope that it
20 might clarify the issue.

21 When that is stricken from the record, you
22 cannot consider that matter. As it is physically
23 stricken from the reporter's notes, so it should be
24 figuratively stricken from your minds and your memory.

25 At times, objection was taken to questions and

1 objections were sustained. You may not speculate
2 on what the answer may have been had the witness
3 been allowed to answer. On the same theory, if the
4 witness did not answer, then the evidence did not
5 get into the record, so you cannot speculate on what
6 he might have said if I had overruled the objection
7 and there had been an answer to the question.
8

9 You, the jurors, are the sole judges of the
10 credibility of the witnesses, which means the believ-
11 ability of their testimony and the weight their
12 testimony deserves.

13 Scrutinize the testimony given and the cir-
14 cumstances under which each witness testified and
15 every matter in evidence which tends to show whether
16 a witness is worthy of belief.

17 Now worthy of belief doesn't mean alone whether
18 you believe the witness was trying to tell the truth
19 or trying to avoid the truth or lie. It was pointed
20 out by counsel that he felt the bank employees who
21 testified did so in good faith, and I assume what he
22 meant is that they were attempting to tell the truth.

23 It doesn't always mean that you are to only de-
24 cide whether the witness is telling the truth or
25 attempting to lie because one of the problems that

Charge of the Court

582

1
2 we will come to later is the witness' own ability
3 to observe or to have observed the perpetrators of
4 the crime, so there are other factors, of course,
5 which you take into consideration. When you use
6 your good common sense you will think of others, but
7 I suggest that you can consider the intelligence of
8 the witness, take into the consideration the motive
9 and state of mind of the witness, why is the witness
10 testifying, does the witness have a reason which might
11 indicate a reason to lie or to tell the truth.

12 The state of mind of the witness: take into
13 consideration the demeanor of the witness on the
14 witness stand and the manner in which the witness
15 answers the questions: Did the witness answer the
16 questions fully, did the witness tell everything
17 that he knew in answer to that question, was the
18 witness able to tell or to answer the question from
19 what that witness saw and observed.

20 Take into consideration the relationship that
21 each witness might bear to either side of the case.
22 You must consider that Mr. Carbone is a Special Agent
23 of the FBI and that he might have an interest in
24 seeing a successful prosecution. On the other hand,
25 the relationship of the mother and brother of the

1
2 defendant is quite obvious, so take that into
3 consideration.

4 Take into consideration the manner in which
5 a witness might be affected by the verdict, take
6 into consideration the extent to which if at all the
7 witness is corroborated or contradicted by other evidence
8 in the case.

9 The Government offered testimony through Mr.
10 Carbone that the defendant Robert Widman at the time
11 or soon after his arrest made certain statements.
12 As I recall them -- and incidentally when I say as I
13 recall the testimony, don't take it for the Gospel
14 truth, you use your own recollection -- this, as I
15 recall it -- and I don't claim that my memory is any
16 better than yours, if I took a statistical guess I
17 would say that at least half of the jurors had a
18 better memory than I have --

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20 (Continued next page.)
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2 But the testimony of Mr. Carbone is that
3 Mr. Widman said something, to the effect that he
4 didn't know Mr. Murphy; and that he said this after
5 he had been shown a picture of Mr. Murphy; he said
6 that he had never been in a 1965 blue Cadillac; he
7 said that he had never used the alias of Robert
8 Hoffman; and he said he hadn't ever been to Honolulu,
9 as I recall it, within the last year.

10 The conduct of the defendant, including state-
11 ments, knowingly made upon being informed that a
12 crime had been committed or upon being confronted with
13 a criminal charge, may be considered by the jury in
14 the light of all the other evidence in the case in
15 determining guilt or innocence. When a defendant
16 voluntarily and intentionally offers an explanation
17 or makes some statement tending to show his innocence,
18 and this explanation or statement is later shown to
19 be false, the jury may consider whether this cir-
20 cumstantial evidence points to a consciousness of
21 guilt.

22 In other words, whether you may draw an infer-
23 ence from the false statements, exculpatory statements,
24 which tends to show his innocence, his non-involvement
25 in the crime charged, if that is later shown to be

false, then the jury may infer from those exculpatory statements later shown to be false, and all the other evidence in the case, the jury may infer that there was a consciousness of guilt that he was aware that he was guilty of the crime charged.

Now, the reason that you may draw the inference is because the law recognizes that it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish his innocence.

Now, whether or not evidence as to a defendant's voluntary statements or statement points to consciousness of guilt -- and the significance to be attached to any such evidence on that is exclusively within the province of the jury.

Now, the statement must be knowingly and voluntarily made, not just an accidental statement. The defendant must be shown by proof beyond a reasonable doubt that he was aware of what he was saying; must be shown that it was voluntarily made; that he intended to make that statement; and the Government must prove beyond a reasonable doubt that before he made that statement he was advised of his constitutional

rights and he was advised of the consequences if he made the statement. In other words, that he had the right to remain silent; that he didn't have to say anything if he didn't want to, but if he did, it could be used against him; he had a right to counsel; and if he couldn't afford counsel, the Court would appoint counsel. If the Government hasn't proved all that beyond a reasonable doubt, then disregard the exculpatory statements.

The indictment, which I will read to you, is based on Federal statutory law. The book I am holding is Crime and Criminal Procedure and it contains statutes passed by the Congress. It is the Congress that defines what a crime is.

The indictment is based on certain sections of Title 18. And the reference to it is a reference to the codification of the statutes under Crimes and Criminal Procedure.

I am going to read the indictment first and then the statute. I am going to read Count 2 first because Count 2 is the graver charge, the more serious charge. It has one element in it that Count 1 does not have.

Count 2 charges as follows:

On or about the 9th day of May, 1974, within

the Eastern District of New York, the defendants Thomas B. Murphy and Robert Widman, knowingly and willfully, by force, violence and intimidation, did take from the person and presence of employees of the Chase Manhattan Bank, 190-02 Jamaica Avenue, Jamaica, New York, approximately \$73,594, United States currency, which money was in the care, custody, control, management and possession of the said bank, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation, and in commission of this act and offense the defendants Thomas B. Murphy and Robert Widman --

Now, this is the additional element that you won't find in Count 1.

-- and in commission of this act and offense the defendants Thomas B. Murphy and Robert Widman did assault and place in jeopardy the lives of the said bank employees as well as the lives of other persons present by the use of a dangerous weapon.

That's in violation of Title 18, United States Code, Section 2113(d).

Now, remember the Subsection (d).

Now, I will read Count 1 to you. And you will find that it agrees exactly the same, except it leaves

1
2 out the last element, when I stopped and hesitated
3 and said, and in the commission of this act -- that's
4 not in the first Count.

5 It reads as follows:

6 On or about the 9th day of May, 1974, within
7 the Eastern District of New York, the defendants
8 Thomas B. Murphy and Robert Widman, knowingly and
9 willfully, by force, violence, and intimidation, did
10 take from the person and presence of employees of the
11 Chase Manhattan Bank, 190-02 Jamaica Avenue, Jamaica,
12 New York, approximately \$73,594, in United States
13 currency, which money was in the care, custody,
14 control, management and possession of said bank, the
15 deposits of which bank were then and there insured by
16 the Federal Deposit Insurance Corporation, in vio-
17 lation of Title 18, United States Code, Section 2113(a)

18 Now, 2113(a) of Title 18 says, whoever, by
19 force and violence, or by intimidation, takes from
20 the person or presence of another, any property or
21 money belonging to, or in the care, custody, control,
22 management or possession, of any bank, commits a
23 violation of that section.

24 So you notice the phraseology is very much
25 like the phraseology in the indictment.

1
2 That's Section (a) of 2113.

3 Now, (d) says, whoever, in committing any
4 offense defined in Subsection (a) assaults any
5 person or puts in jeopardy the life of any person
6 by the use of a dangerous weapon or device, commits
7 a violation of Subsection (d).

8 So that's what makes it the more serious
9 crime, the graver crime.

10 Now, I indicated to you that bank robbery is
11 not a Federal crime unless the money that is in the
12 care, custody, control and management of the bank,
13 the bank's money is insured by a Federal agency or
14 corporation. In this case, the Federal Deposit
15 Insurance Corporation. That is also in the Section,
16 Subsection (f).

17 It says, as used in this section, the term
18 bank means -- I will skip a lot of the other material
19 -- any bank the deposits of which are insured by the
20 Federal Deposit Insurance Corporation.

21 In considering whether the Government has proved
22 the indictment of a defendant by proof beyond a
23 reasonable doubt, I am going to ask you to first
24 consider Count 2, the graver crime. The Government
25 must prove all the following elements by proof beyond

1
2 a reasonable doubt.

3 One. That on May 9, 1974, the accused took
4 approximately \$73,594 from the person or presence of
5 the tellers or other employees of the Chase Manhattan
6 Bank, 190-02 Jamaica Avenue, Jamaica, New York,
7 which money belonged to, or was in the care, the
8 custody, control and management of the Chase Manhattan
9 Bank.

10 That's one element.

11 Two. The act of taking such money by force
12 and violence, or by means of intimidation.

13 Three. Doing such act knowingly and willfully.

14 Four, that the Chase Manhattan was a banking
15 institution, the deposits of which were insured by
16 the Federal Deposit Insurance Corporation at the
17 time of the offense alleged.

18 And five, the act or acts of assaulting or
19 putting in jeopardy the life of any person by the
20 use of a dangerous weapon or device while engaged in
21 stealing such money from the bank as charged.

22 Now, the Government must prove all those
23 essential elements beyond a reasonable doubt. If
24 you find the accused guilty of Count 2, don't con-
25 sider Count 1. Because if you've found the accused

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2 guilty of Count 2, you have already found him guilty
3 of Count 1. But if you haven't found the accused
4 guilty of Count 2, if you find the accused not guilty
5 of Count 2, then you go to Count 1. And the Govern-
6 ment there must prove all the essential elements
7 of the Count charged except for the last one. And
8 that essential element is the act or acts of assaulting
9 or putting in jeopardy the life of any person by the
10 use of a dangerous weapon or device while engaged in
11 stealing such money from the bank.

12 Now, as I say, an act is done knowingly when
13 the person doing it is aware of what he is doing.
14 It is a voluntary and intentional act, not one by
15 mistake or accident. And the statute and the charge
16 in the indictment say the act must be done willfully.
17 And an act is done willfully if done voluntarily and
18 with specific intent to violate the law, the specific
19 intent to do that which the law forbids.

20 Now, the Government must prove that the money
21 was taken by either force and violence, which means
22 physical force. And violence, I don't think I have
23 to explain any further. Or through means of intimi-
24 dation. When we talk about taking by intimidation, it
25 means the willful taking of the money by putting the

1
2 employee in fear of bodily harm.

3 Now, the fear we are talking about is not just
4 fear that someone might have because of some tempera-
5 mental timidity, but the fear that is generated from
6 what the perpetrators said and did, and a fear that
7 he knowingly intends to convey to the employees of
8 the bank.

9 Count 2, when we talk about the element of
10 either assaulting a person, the Government must prove
11 beyond a reasonable doubt that the accused while
12 committing the bank robbery assaulted or put in
13 jeopardy the life of an employee of the bank at the
14 time.

15 Now, an assault is a willful attempt to, a
16 threat to inflict physical harm coupled with an
17 apparent present ability to do so, or any intentional
18 display of force as would give the victim reason to
19 fear and expect immediately bodily harm. When we talk
20 about putting a life in jeopardy by the use of a
21 dangerous weapon or device, we mean that the Government
22 must prove beyond a reasonable doubt that the employee
23 or employees were exposed to death, and that the
24 device or weapon used was capable of inflicting death
25 -- capable of killing an employee of the bank.

1
2 I have charged you on all the essential
3 elements of the crime charged. And, of course, the
4 Government must prove that the accused was the
5 perpetrator; in effect, prove that the accused was
6 in the bank, robbing the bank on May 9, 1974, at
7 or about 8:30 or whatever you find the time to be.

8 The lawyers indicated that that was a critical
9 issue in this case.

10 Now, I want to make sure that the issue is
11 properly phrased. The Government must prove beyond
12 a reasonable doubt that the accused who you find to
13 be guilty of the crime was present at the bank.
14 And the Government must prove that beyond a reasonable
15 doubt. The Government doesn't necessarily have to
16 prove beyond a reasonable doubt that any particular
17 witness identified the accused or either of them as
18 the person present in the bank. Identification
19 testimony is some of the proof that the Government
20 offered.--the main proof that the Government offered
21 -- and I am talking about identification testimony
22 given by all of the bank witnesses -- but there is
23 other proof in the case. When I say there is other
24 proof in the case, I am not indicating that you
25 should credit or believe it. I just want to point

1
2 it out to you.

3 Turning to identification testimony:

4 The evidence in the case includes testimony
5 by Alice DeChiara, Lottie Hoggard, and Joseph Leader,
6 on a prior photographic identification from a spread
7 or spreads of photographs. There has been in-court
8 identification of Mr. Widman by -- and I shouldn't
9 say identification. I should say there is some
10 testimony given by Christina Jonke, Marie Daly,
11 Barbara Ransom and Plenio Medina in Court where the
12 witnesses pointed out with varying degrees of
13 certainty that the defendant Robert Widman was the
14 taller of the bank robbers.

15 There has also been prior photographic
16 identification by Mrs. Jonke and Mrs. Daly of the
17 defendant Robert Widman as the taller bank robber.

18 There has been testimony -- and I can't re-
19 call the witness that identified the defendant
20 Robert Widman in the lineup. There is also testimony
21 of the witnesses -- and I don't recall who -- of
22 the failure to identify the defendant Murphy in the
23 lineup. And I think there is some testimony of one
24 or more witnesses that failed to identify the
25 defendant Widman in the lineup.

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2 Identification testimony must be received
3 with caution and scrutinized with great care.
4 Identification testimony is an expression or belief
5 by the witness of what the witness saw at the time
6 of the crime. The question that should be uppermost
7 in your mind is whether when the witness selected a
8 picture from a spread, selected an individual from a
9 lineup, or made an in-court identification, whether
10 that was the impression that remained in her mind or
11 his mind from what he or she saw at the time --

12 -- as far as the bank employees are concerned,
13 at the time of the robbery; as far as Mr. Medina is
14 concerned, at the time he walked along the street and
15 said he saw an individual in the blue 1965 Cadillac.
16 And that such testimony is not given from any suggestion
17 either through the manner the spread was offered or
18 the lineup was made.

19 In appraising the identification testimony
20 of the witness, you should consider the following:

21 One, whether the witness had the capacity and
22 the adequate opportunity to observe the perpetrator
23 or perpetrators.

24 This will depend on all the circumstances
25 at the time the witness observed the perpetrator or

1
2 offenders.

3 Take into consideration how long or how
4 short a time the witness saw the offender, or how
5 far or how close the witness was to the offender,
6 the lighting conditions at the time, the position
7 from which the witnesses viewed the offender, the
8 emotional state of the witness at the time. Would
9 someone be inclined to be confused, or would it
10 sharpen the witness's view and recollection of the
11 offender.

12 Take into consideration the strength of the
13 identification. Was the witness absolutely sure or
14 absolutely certain, reasonably certain, or in such
15 a serious doubt as to the resemblance to the
16 offender that the identification would be worthless.

17 Scrutinize all the circumstances under which
18 the identification was made prior to trial.

19 If the identification was through the spread
20 of photographs, take into consideration when the
21 identification was made, how soon after the crime.
22 Take into consideration whether the witness selected
23 a photograph from a spread.

24 In this case, the testimony is that it was a
25 spread of 6. Well, look at the photographs. Was it

1
2 a fair sampling? Is it the kind of selection
3 someone would make from all these photographs if
4 the impression came at the time of the robbery?
5 Were the photographs similar enough so that someone
6 who hadn't seen the perpetrator, or no impression was
7 made, would have picked the defendant as the per-
8 petrator?

9 (Continued next page.)
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2 Was it the type of spread that in all likli-
3 hood only someone who would have seen the perpetrator
4 would have picked the defendant as the perpetrator?
5 The lineup identification procedure, you determine
6 whether it was fair. Were the men selected similar
7 enough so that someone who had seen the perpetrator
8 at the time of the crime would have picked the
9 perpetrator out?

10 Was it the kind that was unfair so that any-
11 one without even having seen the perpetrator, would
12 have picked that individual out?

13 Take into consideration the fact that if more
14 than one witness may have selected a defendant as
15 a perpetrator, does not necessarily mean that if two
16 picked the defendant out as the perpetrator of the
17 crime that two is necessarily any greater than one.
18 Use your good common sense in determining for yourself,
19 based on how the witnesses testified, as to whether
20 collectively all of the testimony brings you to the
21 conclusion that the Government proved that the
22 accused was present at the bank. Take into considera-
23 tion the failure of the witnesses to make a selection.

24 The Government's burden is to prove that the
25 accused was present in the bank and committed the

Charge of the Court

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1 robbery. In addition to identification testimony,
2 you may consider all the other evidence in the case,
3 all the testimony concerning a 1965 Cadillac in the
4 area of the bank for three days, prior to the robbery.
5 In itself is not to say being at the bank is any
6 proof. I say you do not segregate testimony and say,
7 "Does this bit of testimony prove beyond a reasonable
8 doubt that the defendants perpetrated the crime?"
9 You must examine the entire evidence in the case to
10 make the determination. If you believe the statements
11 by the defendant Widman was knowingly and voluntarily
12 made under the charge I gave you, of course, you
13 consider that testimony as part of the evidence in
14 the case and based upon all the evidence in the case
15 you determine whether the Government has proved the
16 guilt of the defendant by proof beyond a reasonable
17 doubt.
18

19 Now, the other count in the indictment, Count 3
20 reads as follows:

21 "On or about and between the 6th day of May
22 1974 and the 9th day of May 1974, both dates being
23 approximate and inclusive, within the Eastern District
24 of New York, the defendants Thomas R. Murphy and
25 Robert Widman did knowingly and wilfully conspire

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2 to commit an offense against the United States,
3 in violation of Title 18, United States Code, Section
4 2113 (a) and Section 2113 (d) by conspiring to take
5 by force and violence a sum of money which was in the
6 care, custody, control, management and possession
7 of the Chase Manhattan Bank, 190-02 Jamaica Avenue,
8 Jamaica, New York, the deposits of which bank were then
9 and there insured by the Federal Deposit Insurance
10 Corporation.

11 "In furtherance of the said unlawful conspiracy
12 and for the purpose of effecting the objectives thereof,
13 the defendants Thomas B. Murphy and Robert Widman,
14 within the Eastern District of New York committed the
15 following overt acts:

16 "1. On or about May 6th, 7th, and 8th, 1974, the
17 defendants Thomas B. Murphy and Robert Widman positioned
18 themselves within the vicinity of said bank at a place
19 where the daily functions of the bank could be
20 observed.

21 "2. On or about the 9th day of May 1974, the
22 defendants Thomas B. Murphy and Robert Widman entered
23 the Chase Manhattan Bank at 190-02 Jamaica Avenue,
24 Jamaica, New York and had in their possession
25 dangerous weapons."

1
2 This is called the conspiracy count and comes under
3 a different section of Title 18. Section 371 defines
4 the crime of conspiracy as follows:

5 "If two or more persons conspire either to
6 commit any offense against the United States or to
7 defraud the United States or any agencies thereof
8 in any manner or for any purpose, and one or more of
9 such persons does any act to effect the object of
10 the conspiracy, the section is violated."

11 You see, on the one hand the statute is specific.
12 It refers to bank robbery. That is what we call a
13 substantive crime. On the other hand the conspiracy
14 statute is a general statute. It does not talk about
15 completing a crime. What it prohibits and what it
16 defines as a crime is the understanding and the
17 agreement to commit a crime by two or more persons
18 and the committing of an overt act in furtherance
19 of the purposes of that conspiracy. A conspiracy
20 is a combination of two or more persons by concerted
21 action to accomplish an unlawful purpose. A conspiracy
22 is a kind of partnership in criminal purposes. It is
23 an understanding or agreement to get together in this
24 case to rob the Chase Manhattan Bank at 190-02 Jamaica
25 Avenue. The Government charges -- and again I do not

mean to say that I find that the Government has established its claim, nor do I indicate in any way that the testimony is to be believed because that is a question solely for you. The Government's position is that the planning of this bank robbery started on or about May 6th. That is the preparation for it, the casing of the bank, and that the robbery itself was an overt act. It is not really the robbery, it is that they positioned themselves on May 6th, 7th and 8th, 1974 in the vicinity of the bank and the claim is that they did that for the purpose of carrying out their deal, their understanding to commit bank robbery and the other overt act claimed is that they entered the bank in possession of dangerous weapons.

Even though the Government claims they completed the purpose of the agreement, the conspiracy, the Government does not have to prove that the bank robbery actually was completed in order to prove conspiracy because again I say it is the unlawful agreement that is the crime and not the bank robbery. That is why we call it the "conspiracy charge."

In order for the Government to prove the charge in Count 3, the Government must prove beyond a reasonable doubt that the conspiracy described in the

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2 indictment was wilfully formed and was existing at
3 or about the time alleged, that it was existing for
4 the purpose alleged, to wit, to rob the bank.

5 Second, that the accused wilfully became a
6 member of the conspiracy. In every crime you have to
7 have criminal intent and that is what wilfully means.
8 The Government must prove beyond a reasonable doubt
9 that they entered into this deal or understanding
10 among themselves or between themselves -- between
11 Murphy and Widman -- voluntarily, intentionally and
12 for the purpose of robbing the bank.

13 Three, that one of the conspirators thereafter
14 knowingly committed one of the overt acts charged
15 in the indictment on or about the time alleged.

16 I just went over the two overt acts alleged.
17 The Government must prove that one of those overt
18 acts were committed, and;

19 Four, that such overt act was knowingly done
20 in furtherance of some object or purpose of the
21 conspiracy.

22 In this case it means that the Government
23 prove that whoever committed the overt act -- here
24 the Government claims that both did -- committed the
25 overt act aware of what he was doing and knowing it

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2 was done in order to accomplish the purpose, to wit,
3 to rob the bank.

4 Now, I will shortly excuse you from the court-
5 room to deliberate on the matter, but I want to remind
6 you that your verdict must be unanimous. Each juror
7 must decide the case for himself or herself.

8 Again, you have the obligation of exchanging
9 your views concerning the evidence with the other
10 members of the jury. You violate your obligation if
11 you abandon your duty and just go along without
12 talking about the evidence, without making up your
13 own mind by leaving it to the other jurors.

14 Similarly you violate your obligation if you
15 obstinately refuse to discuss your views with the
16 other jurors and if you take the position that you
17 have arrived at a verdict and you won't budge and
18 you refuse to discuss the evidence. There is nothing
19 wrong with changing your opinion after you have
20 arrived at a tentative opinion if you do so fairly
21 and honestly and if you can do so based on what you
22 understand the evidence to be. You may give up a
23 judgment or determination tentatively arrived at if
24 you can do so without doing violence to your judgment.

25 If you have any communication with the Court,

1 all communications will come through your foreman.
2 If you want to hear any testimony try to identify it,
3 try to tell us what testimony you would like. Give
4 the name of the witness if you can, the subject matter
5 if you can. When we have found the testimony you want,
6 I will call you into the courtroom and I will read it
7 to you. Everything that we do must be done in open
8 court and be recorded.
9

10 During the deliberations, do not tell me how
11 you stand at any time during your deliberations. I
12 am not interested in knowing whether it is six to six,
13 eight to four, ten to two or eleven to one. I am
14 interested in knowing when you have arrived at a
15 unanimous verdict and all you need say to me: "We
16 have arrived at a verdict."

17 Do not tell me what the verdict is. AT that
18 time I will call you into the courtroom and I will ask
19 the Foreman to stand and in effect I will say:

20 "Madam Foreman, how do you find the defendant,
21 Thomas B. Murphy, as to Count 2?"

22 Again, I will remind you I will ask you about
23 Count 2 first. If you say "Not guilty" I will say
24 then:

25 "How do you find as to Count 1?"

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2 Then you will render the verdict. If you say
3 "Not Guilty" I will not ask you further about Count 1.
4 Then I will go to Count 3 and I will ask you:

5 "How do you find the defendant, Thomas B.
6 Murphy, as to Count 3?"

7 You will render your verdict guilty or not
8 guilty. I will ask you the same about Robert Widman
9 and then I will ask Juror No. 2 whether she heard the
10 verdict as rendered by the Foreman and if she says
11 "Yes" I will say:

12 "Is that your verdict?" And, I will go to
13 Juror No. 3 and ask whether that is your verdict and
14 so on until I call on Juror No. 12 to render her
15 verdict. If all the jurors agree in open court to
16 the verdict, then for the first time it becomes the
17 verdict of this case.

18 Now, I ask you to retire from the courtroom.
19 Do not start your deliberations yet. I want to talk
20 to the lawyers for a few moments and then I will
21 call you back into the courtroom.

22 (Jury leaves courtroom.)

23 THE COURT: Ms. O'Brien, any exceptions to the
24 charge?

25 MS. O'BRIEN: Your Honor, there was one thing.

1 Your Honor had mentioned that there was a non-
2 identification of Mr. Widman in a lineup. There was
3 no testimony to that effect.

4 THE COURT: Did I say as to him or did I say
5 I was not sure?

6 MS. O'BRIEN: You did express some degree of
7 uncertainty.

8 THE COURT: Do you agree there was no testimony
9 in the record that a witness failed to identify
10 Mr. Widman?

11 MS. SEYBERT: Whether there is testimony or
12 not, whether a new witness failed to identify Mr. Widman
13 or not, there were witnesses present at the lineup
14 that did not identify Mr. Widman.

15 THE COURT: Is that in the record?

16 MS. SEYBERT: It is not in the record, but
17 to indicate that everyone identified Mr. Widman at
18 a lineup would be against the interest of justice.

19 THE COURT: What are the interest of justice?
20 I do not understand the interest of justice in that
21 regard. What are they, to go outside the record?

22 MS. SEYBERT: No, your Honor. To indicate to
23 the jurors so that everyone selected Mr. Widman is
24 just not the truth.

25 MS. O'BRIEN: Everyone that testified here did

1 select Mr. Widman.

2 Every witness that testified as to Widman's
3 identification did identify Mr. Widman --

4 MR. BORG: May I make --

5 THE COURT: Anything else?

6 MS. O'BRIEN: That's all, your Honor.

7 THE COURT: Do you have any objection to the
8 charge or exceptions to the charge, Mr. Borg?

9 MR. BORG: Yes, I do.

10 First of all, the lack of identification was
11 by each of the witnesses who selected the photo.
12 They were the ones that did not identify Mr. Murphy.

13 MS. O'BRIEN: But the statement was made as to
14 Mr. Widman.

15 THE COURT: I said I was not quite sure.

16 MR. BORG: I object to your Honor's charge where
17 you state that the Government does not have to prove
18 beyond a reasonable doubt that the accused is identified
19 as the perpetrator.

20 THE COURT: Excuse me?

21 MR. BORG: I may be wrong in the wording, but I
22 recall your Honor saying that the Government does not
23 have to prove beyond a reasonable doubt that the
24 accused is identified as the perpetrator.

25 MS. SEYBERT: I would join in that exception.

1 THE COURT: I said I would reframe the issues.

2 Either you or Ms. Seybert went to the jury and
3 said the Government must prove through identification
4 testimony that the accused was in the bank and I
5 said that is not the issue, the issue was whether the
6 accused was in the bank, that identification testimony
7 is some of the evidence.

8 I wrote that out because of what Ms. Seybert
9 said. She went to the jury and said that the only
10 thing here is the identification testimony and that
11 just is not true. That is why I said what I said.

12 MS. SEYBERT: I do not think I face it in that
13 manner.

14 MR. BORG: I stated that the Government must
15 prove in fact that Murphy was in the bank that day.

16 THE COURT: Well, you may have said that too.

17 MR. BORG: I did say that.

18 THE COURT: I say you may have said that too,
19 but either you or Ms. Seybert or both of you went to
20 the jury and said, in effect, the only testimony in
21 this case to prove that these defendants were in the
22 bank were identification testimony. Do you remember
23 saying that?

24 MS. SEYBERT: I said there is no other proof --
25 independent proof that my client was in the bank --

1 THE COURT: Exactly.

2 MS. SEYBERT: -- other than identification.

3 THE COURT: That is just not true.

4 MR. BORG: Would your Honor correct --

5 THE COURT: What was all the other testimony
6 about? You agree that the robbery was committed.
7 What's the testimony about them being at the bank
8 for three days before? What is the testimony concerning
9 exculpatory statements? What is the testimony about
10 the trip to Hawaii and so forth? Don't you think that's
11 on that issue?

12 MS. SEYBERT: Doesn't provide the Government
13 with the case that this particular defendant was in
14 the bank at the time on that day.

15 THE COURT: I know the case can be better,
16 but the perpetrator was not considered enough to leave
17 it. All you are saying is that the case could be a
18 better case.

19 MS. SEYBERT: Yes.

20 THE COURT: That avoids the argument.

21 MR. BORG: Would you Honor correct where your
22 Honor stated --

23 THE COURT: Go back and read back what I said.

24 Anything else that you have, Mr. Borg?

25 MR. BORG: No further objections.

1 THE COURT: Any exception to the charge?

2 MS. SEYBERT: No, your Honor.

3 THE COURT: The only question is whether I
4 will charge any further on Widman --

5 MR. BORG: What about Murphy, regarding the
6 identification of the accused in the bank as being
7 the perpetrator?

8 THE COURT: What about it?

9 MR. BORG: I was excepting to your Honor's
10 statement --

11 THE COURT: We are waiting for Mr. Barbella
12 to come up and read what I said.

13 MR. BORG: That was the lineup. This is her
14 argument that your Honor stated about non-identification
15 at a lineup.

16 THE COURT: Yes.

17 MR. BORG: Your Honor either said Widman when
18 he meant Murphy --

19 THE COURT: I said that there was a failure
20 to identify Murphy. I said there might have been a
21 failure to identify Widman. That is what the Govern-
22 ment is complaining about. We will get that from
23 Mr. Barbella and we will hear it again.

24 (Mr. Barbella entered the courtroom.)

25 THE COURT: I want to know whether I said it

1 was not necessary for the Government to prove that
2 the defendants were the perpetrators of the crime by
3 proof beyond a reasonable doubt? Will you please go
4 to that part and find it. I think I started by saying
5 the real issue in the case is whether the Government
6 has proved beyond a reasonable doubt that the accused
7 or the defendants were in the bank at the time of
8 the bank robbery. Take it from there and read every-
9 thing.

10 (Charge read.)

11 THE COURT: After that I think I said
12 "Identification testimony was not the only testimony
13 in the case to prove that" and I said that only be-
14 cause Ms. Seybert went to the jury and said that that
15 was the only testimony in the case.

16 The case from which I got the identification
17 charge was United States against Holly. I do not have
18 the citation, except it was in the United States
19 Attorney's Bulletin. It was a Fourth Circuit case
20 decided on May 20th, 1974.

21 Ms. Seybert is shaking her head. Is that what
22 you are objecting to?

23 MR. BARBELLA: "The Government does not
24 necessarily have to prove beyond a reasonable doubt
25 that any particular witness identified the accused or

either of them as the person present in the bank."

(Continued on next page)

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1 THE COURT: What did you say is wrong with
2 that?

3 MS. SEYBERT: If they do not have to prove
4 beyond a reasonable doubt that this man robbed the bank,
5 then what is this all about?

6 THE COURT: Read it once more, maybe I did not
7 understand it.

8 MR. BARBELLA: "The Government does not necessarily
9 have to prove beyond a reasonable doubt that any
10 particular witness identified the accused or either of
11 them as the person present in the bank."

12 THE COURT: That a particular witness.

13 All right, I will clarify that and say the
14 Government does not have to prove beyond a reasonable
15 doubt the identifying witness is absolutely certain
16 as to the identification.

17 MR. BORG: Would your Honor add that they
18 must prove beyond a reasonable doubt that they must
19 be in fact in the bank?

20 THE COURT: Yes, I will say that again and
21 again, as many times as you want it, because that is
22 the issue. I want them to understand that the issue
23 is not whether a witness can positively prove beyond
24 a reasonable doubt that this was the man. I want to
25 make sure that the jury understands that prior

1 identification testimony or in Court identification
2 testimony is the only proof that these defendants
3 were in the bank.

4 MR. BORG: Could your Honor at least leave
5 them with the thought that they must be satisfied
6 beyond a reasonable doubt that the witnesses are
7 certain -- they must be satisfied beyond a reasonable
8 doubt, not the witnesses to be satisfied beyond a
9 reasonable doubt. I think that is the language.

10 THE COURT: No, I will not do that because it
11 just is not true. Identification of these defendants
12 as being in the bank is a little confusing. That is
13 why I did not use "Identify them as the perpetrators."
14 That issue must be sustained by the Government, but
15 that's a lot different than saying that the only
16 proof that these defendants were in the bank was the
17 identification testimony. If this were all the
18 testimony that the Government had, I would charge
19 them that the Government has only the identifying
20 testimony and that they must believe all that testimony
21 beyond a reasonable doubt. I do not even like that
22 phraseology. The issue must be proof beyond a
23 reasonable doubt, not believe each witness beyond a
24 reasonable doubt. That's really saying to the jury:
25 "You must believe each witness separately and you must

believe that they positively identified the accused as the perpetrator, otherwise you must bring in a verdict of not guilty." It is just not the law.

Give me that sentence again.

(Charge read.)

MR. BORG: I think I had outlined a charge in my request -- I'd like to quote from it, but I do not have my copy of it.

(Document handed to counsel.)

MR. BORG: Your Honor, may I read from my own submission?

I am requesting your Honor to charge -- to emphasize that the burden of proof on the prosecution extends to every element of the crime charged and this specifically includes the burden of proof beyond a reasonable doubt as to the identification of the defendant as the perpetrator of the crime with which he stands charged. If after examining the testimony you have a reasonable doubt as to the accuracy of their identification, as to the ability to identify the defendants at all, you must find the defendant not guilty.

That is adopted from United States vs. Telsare.

I think that covers your Honor's statement about identifying the defendants in the bank.

1 That specifically states reasonable doubt
2 as to the accuracy of the identification.

3 THE COURT: I will take this statement from
4 Holly and it might satisfy both:

5 One of the most important issues in this case
6 is the identification of the defendant as the
7 perpetrator of the crime. The Government has the
8 burden of proving identity beyond a reasonable doubt.
9 It is not essential that the witness himself be free
10 from doubt as to the correctness of his statement.

11 That is the thought that I tried to get across.

12 However, you the jury must be satisfied beyond
13 a reasonable doubt of the accuracy of the identification
14 of the defendant before you may convict him. If
15 you are not convinced beyond a reasonable doubt the
16 defendant was a person who committed the crime, you
17 must find the defendant not guilty.

18 MS. O'BRIEN: Could you also add including the
19 identification and the non-identification testimony?

20 THE COURT: I have already charged that.

21 MS. O'BRIEN: Including all the evidence?

22 MR. BORG: That specifically goes to identifica-
23 tion.

24 THE COURT: No, I am not going to recharge.

25 Do you want me to tell them to forget the

1 statement that I made:

2 "The Government doesn't necessarily have to
3 prove beyond a reasonable doubt that any particular
4 witness identified the accused or either them as a
5 person present in the bank."

6 MR. BORG: Yes, I would ask your Honor to correct
7 that and read what your Honor read from Holly.

8 MS. O'BRIEN: I would request that you include
9 in this portion of the charge the statement that they
10 do not have to find that each identifying witness
11 found -- that --

12 THE COURT: It says that. It is not essential
13 that the witness himself be free from doubt as to
14 the correctness of his statement.

15 MS. O'BRIEN: And that other elements of the
16 identification issue can be included, aside from the
17 in court identification, including the evidence of
18 the cars and the evidence of the trips. You don't
19 have to name the cars and the trips, but the other
20 non-identifying testimony.

21 MR. BORG: My sole exception was to that
22 statement and phrase.

23 THE COURT: The longer we talk, the more
24 involved it gets. I never cut anybody off. If I
25 thought there was anything to what Ms. O'Brien was

1 saying, I would listen to her.

2 I am going to paraphrase Holly and I am not
3 going to again tell them that there is other evidence
4 in the case. I think I have told them that.

5 MS. O'BRIEN: What about the statement on
6 Mr. Widman?

7 THE COURT: I am not going to do anything about
8 it. I think it was so indefinite that they'd recognize
9 it. I have faith in the jury. They will understand
10 the case.

11 (Jury present.)

12 THE COURT: I said the Government does not
13 necessarily have to prove beyond a reasonable doubt
14 that any particular witness identifies the accused
15 or either of them as the person present in the bank.

16 Now, that language is a little clumsy and might
17 be misinterpreted. I will ask you to disregard that,
18 and instead again I remind you that the Government
19 must prove beyond a reasonable doubt that the accused
20 was present in the bank on May 9th, 1974 and was the
21 robber or with the robber at that time.

22 The Government has the burden of proving that
23 beyond a reasonable doubt. It is not essential that
24 the witness be entirely free from doubt as to the
25 correctness of his statement -- his testimony concerning

1 the identification of the accused, either in court
2 or at a lineup or at a photographic spread.

3 However, you must be satisfied beyond a
4 reasonable doubt of the accuracy of the identification
5 of the defendant as being in the bank. In coming to
6 a determination on that contested issue, take all
7 the evidence into consideration, not the identification
8 testimony alone but all the evidence.

9 Now, if either lawyer wants me to excuse the
10 jury for further argument on it, I will do it.

11 You, Ms. O'Brien?

12 MS. O'BRIEN: No.

13 MS. SEYBERT: No, your Honor.

14 MR. BORG: Yes, your Honor.

15 THE COURT: The jury may be excused.

16 (Jury leaves courtroom.)

17 MR. BORG: Your Honor, the exception to that
18 portion of your Honor's charge specifically dealt
19 with the identification and the accuracy of it. Your
20 Honor again included along with the other evidence.

21 I think that the point your Honor was trying
22 to reach in the original charge to the jury was
23 specifically the accuracy of the witnesses beyond
24 a reasonable doubt.

25 THE COURT: Yes.

1 MR. BORG: And I think again your Honor alluded
2 -- alluded to the other evidence and the other evidence
3 your Honor does not relate to the accuracy of the
4 identification -- it does not. The other evidence of
5 a trip to Hawaii goes to the entire case and I think
6 your Honor put in the other evidence with relating
7 to the --

8 THE COURT: You do not think the other
9 evidence bears on the question as to whether these
10 defendants robbed the bank?

11 MR. BORG: It goes to the entire case.

12 THE COURT: Yes, that is all I said.
13 You have your exception on the record.
14 Seat the jury.

15 MR. BORG: Once again the exception was not
16 that it shouldn't go in as to whether they robbed the
17 bank, but my exception is that your Honor put it in
18 relating to the identification issue alone. That's
19 the exception.

20 THE COURT: All right.

21 (Jury present.)

22 THE COURT: Alternate Juror No. 1, you are
23 excused. You will find your lunch in my chambers.
24 Would you please take your coat and other possessions
25 out of the jury room. You may not be in the jury room

1 when the jury starts deliberating. Thank you.

2 (Alternate juror excused.)

3 THE COURT: Would the Clerk please swear in
4 the Marshals?

5 (Marshals sworn.)

6 THE COURT: The jurors are excused for
7 deliberation on the matter before them. Your lunch
8 has arrived and that will probably be your first
9 order of business. I will excuse the lawyers so they
10 can have their lunch. I will ask them to return by
11 2:30. In the meantime, if you send in any notes you
12 will not get a response until I have a chance to
13 talk with the lawyers and it will be sometime after
14 2:30.

15 (The jurors are excused to begin their
16 deliberations.)

17 (Jury leaves courtroom.)

18 MS. SEYBERT: May Mr. Widman have an opportunity
19 to speak with his family if the Marshals will allow it?

20 THE COURT: I will leave that with the Marshals.

21 (Luncheon recess taken.)
22
23
24
25

United States of America vs.

63

United States District Court for

Eastern District of New York

DEFENDANT

ROBERT WIDMAN

DOCKET NO.

74 CR 817

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (8/74)

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH DAY YEAR
4 4 1975

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Joanna, Seybert, Esq. of Legal Aid

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that
there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☐ NOT GUILTY

M'FILED

There being a finding/verdict of
☐ NOT GUILTY. Defendant is discharged
☒ GUILTY. in counts 2 & 3

FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of violating T-18, U.S.C. Sec. 2113(d) & 2 in that on or about and between May 6 and May 9, 1974, ~~the~~ both dates being approximate and inclusive, the defendant, with another, did knowingly and wilfully conspire and did take from the presence of employees of the Chase Manhattan Bank, Jamaica, N.Y. approximately \$73,594 in U.S. currency, which was in the care, custody, control, management & possession of said bank, the deposits of which were then and there insured by the F.B.I.C. and did place in jeopardy the lives of said persons by the use of a dangerous weapon

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 15 years on count 2 pursuant to T-18, U.S.C. Sec. 4208(a)(2) and 5 years on count 3 pursuant to T-18, U.S.C. Sec. 4208(a)(2), said sentences to run concurrently

SENTENCE
OR
PROBATION
ORDER

SPECIAL
CONDITIONS
OF
PROBATION

ADDITIONAL
CONDITIONS
OF
PROBATION

COMMITMENT
RECOMMEN-
DATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge

☐ U.S. Magistrate

Date

4/4/75

United States of America vs.

64 United States District Court

DEFENDANT

Eastern District of New York

THOMAS B. MURPHY

DOCKET NO. 74 CR 817

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (6/74)

In the presence of the attorney for the government
the defendant appeared in person on this dateMONTH DAY YEAR
4 4 1975

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Harold Borg, Esq.

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,☐ NOLO CONTENDERE,☐ NOT GUILTY☐ NOT GUILTY. Defendant is discharged

M'FILED

There being a finding/verdict of

☒ GUILTY. in counts 2 & 3FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of
and 2 in that on or about and between May 6, and May 9, 1974, both dates
being approximate and inclusive, the defendant, with another, did know-
ingly and wilfully conspire and did take from the presence of em-
ployees of the Chase Manhattan Bank, Jamaica, N.Y., approximately
\$73,594.00 in U.S. currency, which was in the care, custody, control
and possession of said bank the deposits of which were then and there
insured by the F.D.I.C. and did place in jeopardy the lives of said
persons by the use of dangerous weapon

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 15 years

on count 2, pursuant to T-18, U.S.C. Sec. 4208(a)(2) and 5 years on count 3 pursuant to T-18, U.S.C. Sec. 4208(a)(2), said sentences to run concurrently.

SENTENCE
OR
PROBATION
ORDERSPECIAL
CONDITIONS
OF
PROBATIONADDITIONAL
CONDITIONS
OF
PROBATIONCOMMITMENT
RECOMMEN-
DATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge☐ U.S. Magistrate

Date

4/4/75

19

DeChiara-direct

117

THE COURT: What is the basis of the objection?

MR. BORG: Your Honor, I will get to the objection, but if these photos are to be introduced into evidence now prior to the Government's authenticity of them, there is always the likelihood that the jury may now become the expert on identification and try to compare them, so even before attempting to admit these they will have to prove the authenticity. Just putting them in evidence now will mean that the jury will look and come to compare them with the defendant and make their own identification.

THE COURT: Anything else?

MR. BORG: No, your Honor.

THE COURT: Do you have any objection?

MS. SEYBERT: Same objection that he would have.

THE COURT: Well, the objection is overruled. I will admit them.

The only thing that concerns me is the old problem of introducing mug shots, and I think that what you will have to do before you show them to the jury is to cut it in half or make other photographs and substitute for them, or enlarge them, because I don't think the jury ought to know that this is a mug shot, certainly not at this point.

20

DeChiara0direct

MS. O'BRIEN: Your Honor, they do have evidence stickers on them.

I would ask that they be shown at least in court now.

THE COURT: Oh, no, that is just the point, I won't show them.

How can you show these as evidence now, it is not evidence until they are accepted.

Now you have a sticker on it, and that indicates that it was somehow in the case before.

MS. O'BRIEN: That is the evidence sticker which is to hide a number, it is for F.B.I. purposes.

THE COURT: Yes, for F.B.I. purposes, they tag everything for evidence.

MR. BORG: A mug shot inherently is prejudicial just by looking at the front view and side view.

THE COURT: I don't believe that but the Court has said it, so we will do our best to cut it or --

MS. O'BRIEN: You wish to cut it in half.

THE COURT: You either cut it or enlarge the photographs.

MS. O'BRIEN: I don't know how long that will take, sir. Certainly we can' do it before this witness leaves the stand --

21

DeChiara-direct

119

THE COURT: Why should you do it now, I want it done before the jury sees it, that is all, not before the witness leaves the stand.

MS. O'BRIEN: Your Honor, I can call up the F.B.I. photographer or -- I don't know how soon it can be done.

THE COURT: You can get another shot of it or cut the photograph in half.

MS. O'BRIEN: I have no objection to cutting it in half.

THE COURT: It now stands side by side, you will have a side view and a front view, and you can cut off the number so that they don't look as if something is hidden.

MS. O'BRIEN: I have no objection to cutting off the lower portion, to cut off the evidence stickers, but if we cut off the front view and the side view --

THE COURT: People don't usually see front and side views except in a mug shot, that is the only place I know of, and I want to avoid any charge that there was prejudice here in the introduction of this exhibit because the jury can interpret this as being a mug shot, that is the only objection that I find for these photographs.

22

DeChiara-direct

The other, of course, is that it is subject to connection, and if you can't connect it I will have to strike it.

Now somebody had to be present to prove that this defendant looked like that picture at the time.

MS. O'BRIEN: Yes, your Honor, but that is not the problem, I just feel that severing them in half would radically alter the way these were shown to this witness, that is the way it was shown to the witness.

THE COURT: That doesn't matter, this witness says that these photographs look like the man that held up the bank, they are introduced into evidence before the jury sees them but all prejudicial material has to be removed. The prejudicial material is that the front and side view looks like a mug shot, which it is.

Now if you find a way of eliminating that prejudice then it will be shown to the jury, if it can't be, then it won't be shown.

MS. O'BRIEN: Can we come up with the fiction that this is an army photograph.

THE COURT: No, no, no, I won't allow these side and front views to be shown side by side. If they are cut and if they look like two different

1
2 photographs, we will have no problem.

3 MS. O'BRIEN: May we have time, then, to cut
4 the photographs, to sever them.

5 THE COURT: You are not going to spend one
6 minute on that, you are going to do that after court.

7 MS. O'BRIEN: Your Honor, I would like to have
8 the jury view the photographs as the witness testifies.

9 THE COURT: They are not going to see it.

10 MS. O'BRIEN: In case they forget.

11 THE COURT: The jury is not going to see it
12 and I am not going to suspend.

13 Now seat the jury.

14 MS. O'BRIEN: Your Honor, I move to admit these
15 into evidence, subject to your Honor's --

16 THE COURT: There is another one.

17 (At this point the F.B.I. Agent handed a photo-
18 graph to the Court.)

19 THE COURT: Let me see it.

20 He has this one, he has this one, the F.B.I.
21 has a similar photograph.

22 MR. BORG: Judge, it is a front view of the
23 photo, although I understand your Honor's feeling about
24 all of the evidence, but this is prejudicial, the fact
25 that it is a front view, it is somewhat of a front shot.

24

DeChiara-direct

122

MS. O'BRIEN: That is ridiculous.

MR. BORG: People don't pose that way.

THE COURT: If this were in a photo album you would think he was skiing up in Vermont.

If this were separated from this (indicating), cut it in half then after that I will ask you to put any objection you want on the record and how you suggest that it be altered to avoid the prejudice I indicated, and I will then listen to you or at least you will be allowed to make a record of it.

This is proper, I have used this any number of times in any number of cases.

(At this point the Clerk cut a photograph in half composed of two individual photographs.)

THE COURT: All right.

If you want to now, since we have altered the exhibit, show it to the witness and ask whether she still says that looks like the individual who robbed the bank --

MS. O'BRIEN: Shall I show it to her now?

MR. BORG: Are we going to show the jury two photographs or just one?

THE COURT: The two halves, both are admitted into evidence.

1
2 MR. BORG: Then they will see the side view
3 by itself and if the jury compares, then they will
4 know that it is a mug shot.

5 THE COURT: Mrs. DeChiara, do those pictures
6 look like the man who robbed the bank with the
7 exception that you noted before?

8 THE WITNESS: I would say so.

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10 (Continued on next page)
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DeChiara-direct

124

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THE COURT: What is the objection.

MR. BORG: The objection is based on the fact that even though they are cut in half and one is a front view and one is a side view, if the jury sees them together as one exhibit it will be obvious that it is a mug shot.

THE COURT: Well, all right.

Any other objection.

MR. BORG: No, your Honor.

THE COURT: All right.

The objection is overruled. Now you mark those exhibits -- what is that exhibit?

THE CLERK: That particular exhibit, that one is 5A.

THE COURT: This will be 5B.

THE CLERK: There is 5A until F inclusive.

THE COURT: Then mark this one picture as 5G and the other picture as 5H.

THE CLERK: So marked.

That is in evidence, your Honor?

THE COURT: Yes, in evidence.

THE CLERK: So marked.

THE COURT: Seat the jury.

Now if you want to show it to them --

1
2 MS. O'BRIEN: Just these.

3 THE COURT: (Continuing) You may pass them
4 around, we will give one picture to the foreman and
5 one picture to Juror No. 7.

6 MR. BORG: Is your Honor going to allow all
7 the jurors to see both pictures?

8 THE COURT: Yes, surely.

9 MR. BORG: All right, it is on those grounds
10 I am objecting.

11 THE COURT: All the jurors will see all the
12 pictures, front and side.

13 MS. O'BRIEN: On the other photographs, we
14 will take them and cut them in half and remove their
15 stickers, but I am interested in these now.

16 THE COURT: If there is no objection to showing
17 the other prints --

18 MS. O'BRIEN: I would like to show the rest of
19 them, yes.

20 THE COURT: Do you have any objection?

21 What objection could you have, what objection
22 do you have to that?

23 MR. BORG: I have no objection.

24 THE COURT: Do you have any objection?

25 MS. SEYBERT: They look like mug shots.

1
2 THE COURT: They certainly do and I assume they
3 are not of this defendant.

4 MS. SEYBERT: One is pretty similar to the
5 photograph that is being admitted into evidence at
6 this point.

7 THE COURT: That may even show the difference
8 more than show the similarities.

9 THE CLERK: These are also in evidence.

10 THE COURT: They are in evidence.

11 THE CLERK: 5B, C, D, E and F previously marked
12 for identification are now marked in evidence.

13 THE COURT: All right, seat the jury.

14 There is writing on the back of all the other
15 mug shots, and so I will ask that the jury not turn
16 them over.

17 Is that all right?

18 MS. O'BRIEN: It is fine, your Honor.

19 MR. BORG: I'm sorry, Judge.

20 THE COURT: What is the name, as a matter of
21 fact one of them says Chase Manhattan Bank,
22 40 West 34th Street.

23 Now does that mean that he was a suspect in
24 another robbery at the Chase Manhattan Bank?

25 That is dated 8/17 -- I am sorry, 3/22/74.

29

DeChiara-direct

Are you giving information away here?

THE F.B.I.AGENT: No, that probably was a suspect in another bank robbery.

MR. BORG: Yes, that is what he is saying and --

THE COURT: I certainly don't want the jury to see these shots -- I mean to see this.

The F.B.I. AGENT: If you want to cross it out.

THE COURT: I don't know, if it is crossed out -- if I tell them not to turn them over and read them, I'm sure they won't.

MR. BORG: I have no objection to having them turn it over.

THE COURT: That I wouldn't want, I don't want any confusion, I don't want any advantage, I don't want any disadvantage.

The only other thing I suggest is that he just blank it out before you show them to them.

Now if you want to just do that, and just put the stickers which are on the back, put stickers on, then we won't have a problem.

Now you can show them after cross-examination, too.

Just cover the backs.

MS. O'BRIEN: Do you want the backs crossed out?

30

DeChiara-direct

THE COURT: No, covered, covered with paper, stapled or pasted.

MS. O'BRIEN: All right, all right, why don't you paste them.

THE COURT: Martin says it is not in his union contract, you are supposed to do that.

THE CLERK: I will do it as soon as I seat the jury.

THE COURT: All right, seat the jury and Martin will do it during cross-examination, and when it is all done he will turn them over to you and you can do whatever you want with them.

MS. O'BRIEN: All right.

(At 4:35 p.m. the jury took its place in the jury box.)

THE COURT: You had better ask that question about 5G and 5H.

MS. O'BRIEN: Okay.

DIRECT EXAMINATION

BY MS. O'BRIEN CONTINUING:

Q Mrs. DeChiara, I'm going to show you two photographs that have been marked 5G and 5H and ask you if this is a photograph of the individual that you have selected from a prior photographic spread sometime within the month of

the robbery.

A Is this the photograph I selected?

Q Yes.

A Yes --

THE COURT: Objection sustained, objection sustained.

Look at those photographs.

Do you say that those look like the bank robber?

THE WITNESS: Yes.

THE COURT: All right.

MS. O'BRIEN: I move for their admittance into evidence.

I have no further questions.

THE COURT: They have all been in.

Mr. Borg, you may proceed.

(Continued on next page)

DS fls 18

De Chiara-redirect

1
2 THE COURT: Didn't you have this on direct,
3 Ms. O'Brien?

4 MS. O'BRIEN: Yes, your Honor.

5 Q Can you tell the jury now which are the in-
6 dividuals-- which of the individuals you selected on this
7 occasion.

8 A No. 4.

9 MS. O'BRIEN: I move to have the jury view
10 these after they have been marked in evidence.

11 THE COURT: Have they been marked?

12 MS. O'BRIEN: I don't believe so.

13 THE CLERK: Yes, Judge.

14 MS. O'BRIEN: I move to admit both of them in
15 evidence.

16 THE CLERK: 2 is in evidence, your Honor.

17 THE COURT: What is the application?

18 MS. O'BRIEN: Your Honor, I would move to have
19 both these photographs submitted in evidence and
20 shown to the jury.

21 THE COURT: Give them to the foreman.

22 MS. O'BRIEN: Equally so with the photographic
23 spread, your Honor, Government's Exhibit 5-B through
24 5-H, your Honor.

25 THE COURT: 5-A is not submitted, right?

1
2 that was shown to you by the FBI agents?

3 A Yes, I think they are.

4 MR. BORG: I am sorry, I didn't hear the
5 answer.

6 (Answer read.)

7 MS. O'BRIEN: May I show them Government's
8 Exhibits 5-A and and 5-G and H?

9 THE COURT: We don't have to go over that
10 again. You are not being shown the actual photo-
11 graph that this witness selected from the group
12 because of certain questions of law that I ruled
13 on. There is no mystery to it at all. This
14 witness has said that it is a duplicate of that
15 picture.

16 All right. Anything further?

17 MS. O'BRIEN: May I show those pictures to
18 the jury, your Honor, 5-G and 5-H?

19 THE COURT: It may take too long. If
20 there are no other questions, you can show those
21 pictures tomorrow morning at the outset.

22 MS. O'BRIEN: I have no other questions of
23 this witness, your Honor.

24 THE COURT: Anyone else? Any other ques-
25 tions of this witness before I excuse her, Mr. Borg,

Hoggard - direct

Q I'm going to show you six photographs, Government's Exhibits 5A through D, and ask you if these are the six photographs that were shown to you by FBI agents?

A Yes.

Q On that occasion when you were first shown those photographs did you on that date select anyone of those photographs as being the photograph of the shorter dark-haired robber?

A As the one that looked like him.

Q One that looked like him?

A Yes.

Q Can you please tell us which photograph you selected?

A This one (indicating).

THE COURT: Let the record show the witness pointed out 5A.

Q Could you please tell us what characteristics of the man in that photograph resembled the robber?

A His hair, his mustache and his eyes..

Q Anything further?

A No, no, sir.

Q Would you say the hair style was the same or similar to the hair style of the individual that robbed the bank?

8

Hoggard - direct

A Yes.

Q All right.

And at the time that the agent showed you these photos, did they ever inform you that they had a suspect in the photos?

Did they ever tell you that you should select one individual, any words to that effect?

A No.

Q Could you please tell us what the agents had said to you prior to showing you this photographic spread?

A They just told me they wanted me to look at some photographs, that's all.

Q Did they in any manner, shape or form point out Government's Exhibit 5A?

THE COURT: That's the one you just pointed out.

THE WITNESS: This one here?

THE COURT: Yes.

THE WITNESS: Did they point the guy out to me?

BY MS. O'BRIEN:

Q Did they say "Take a look at that fellow"? Or in any way indicate that photograph to you?

A No.

Q Is it your testimony that you on your own selected Government's Exhibit 5A?

A Yes.

1 9 Hoggard - direct

2 Q I show you Government's Exhibit 5G and 5H and
3 ask you if this is a duplicate of the photograph that you
4 selected, Government's Exhibit 5A?

5 A Duplicate?

6 Q Yes.

7 Is that the same photograph?

8 A It looks like it.

9 MS. O'BRIEN: Your Honor, may I show to the
10 jury Government's Exhibit 5B through H?

11 THE COURT: Yes.

12 MS. O'BRIEN: Thank you.

13 (Exhibits circulated amongst jurors.)

14 MS. O'BRIEN: I have no further questions, your
15 Honor.

16 CROSS-EXAMINATION

17 BY MR. BORG:

18 Q Mrs. Hoggard, when you looked at the photos,
19 you saw another group of photos, didn't you?

20 A Yes.

21 Q You didn't pick anybody out of that, did you?

22 A Yeah, I think I did.

23 Q You picked out other photographs?

24 A No, I didn't. I just, you know, I said that
25 before I got to that one I had picked out some photos.

Carbone - cross - Borg

7
witness who testified here, testified that she selected
Number 5?

A Yes, I do.

Q You recall that?

A Yes.

Q Do you recall her saying that if she had to
assign a number as to degree of certainty, she said about
eighty?

A Not at the lineup.

Q No, no, today, on the witness stand.

A Yesterday?

Q Yes.

A I believe I recall that, yes.

Q She said about eighty; is that right?

A I think that's right.

Q And to Number 5?

A That's correct.

Q And you were present at the lineup; is that
correct?

A Yes, I was.

Q Would you tell the Jury if you know the identity
of Number 5?

A Yes, I do.

Q Tell the Jury.

8 Carbone - cross - Borg

A Special Agent Jerry Lang of the FBI.

Q She picked out an FBI agent?

A Yes, she did.

MR. BORG: I have nothing else.

Q She picked out an FBI agent as being the shorter man; right?

A She didn't say it was the shorter man to me, sir.

Q Well, sir, you had Mr. Thomas Murphy, who is sitting there today, in that lineup, didn't you?

A Yes, I did.

Q And you had Agent Number 5 standing there also?

A Yes, I did.

Q And she didn't pick out Mr. Murphy, did she?

A No, she didn't.

Q What is the agent's name she picked out?

A Jerry Lang.

MR. BORG: Thank you.

THE COURT: Mrs. Seybert.

CROSS-EXAMINATION

BY MS. SEYBERT:

Q Mr. Carbone, when was the first occasion you had to speak with Mr. Widman?

A I believe it was October 2, 1974.

Leader-direct

3
graphic spread, sir?

A A few days after or so.

Q A few days after what, sir?

A After the robbery.

Q After the robbery?

A Yes.

Q On that occasion, were you able to select any photograph from that spread, spread of six photographs, were you able to select anyone as being the shorter of the two robbers?

A Yes.

Q Could you please tell us which photograph you selected?

A This.

THE COURT: All right. Let the record show the witness pointed to Exhibit 5-A.

Q Now, can you tell us, sir, in what way that photograph, 5-A, resembles the shorter robber?

A I'd say the hair and the moustache.

Q Is there anything other than the hair and the moustache?

A I'd say the height.

Q Can you see the height from the photograph?

A No. But I --

MS v. Murphy Borey

STATE OF NEW YORK)
 : SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the *9* day of *May*, 1975 deponent served the within *Appendix* upon *MS. Atty.*

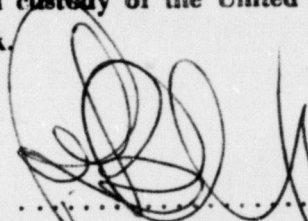
attorney(s) for

Appellee

in this action, at

225 Admen Plaza East.
Brooklyn, NY.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


.....
ROBERT BAILEY

Sworn to before me, this
17 day of *May*, 1975.

William Bailey
WILLIAM BAILEY

Notary Public, State of New York
No. 43-0132945

Qualified in Richmond County
Commission Expires March 30, 1976